STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff/Cross-Appellant,	UNPUBLISHED October 11, 2002
v	No. 225563 Genesee Circuit Court
ANTHONY J. HORTON, Defendant/Cross-Appellee.	LC No. 99-004158-FH

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

The people appeal by leave granted an order of the trial court granting defendant's motion for a new trial. We reverse and remand with instructions to the trial court to reinstate defendant's conviction and sentence.

At the conclusion of a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7402(2)(d)(iii). As a third habitual offender, MCL 769.11, defendant was sentenced to twelve to ninety-six months in prison.

On remand from this Court, defendant filed a motion for a new trial. Proceedings on remand were held on October 8, 2001, October 15, 2001, and October 29, 2001. During the remand proceedings, defense counsel argued that defendant received ineffective assistance of counsel and that plain error requiring reversal occurred. The trial judge granted the motion concluding that errors occurred during defendant's trial. However, the basis for the court's ruling on either ineffective assistance of counsel or plain error is not clear.[1]

[1] The trial court ruled as follows:

> *The Court:* . . . And this was a trial where there was error. Mr. Horton had a jury trial in 1999, June, and certain things happened which he complains about on appeal. One is that an expert witness testified about users and marijuana, where as he had not been qualified to give expertise about users.
>
> One is that the drug profile information was given to the jury without a cautionary instruction. Maybe it shouldn't have been given at all.

(continued…)

Under our statute,[2] as well as our court rule[3], "the operative principles regarding new trial motions are that the court 'may,' in the 'interest of justice' or to prevent a 'miscarriage of

(…continued)

> One is that his attorney failed to get introduced pay stubs justifying the amount of cash that he had in his possession at the time of the arrest.
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> And, finally, the impeachment instruction wasn't given.
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> Frankly, the last one just baffles me, because I don't know how that happened, but the other incidents I perhaps learned some law from. And as I reviewed this I tried to figure out what would happen if he had had a trial without the profile information and with the pay stubs. Now, he was able to testify about why he had $900 in cash on him. So, in a way, what the pay stubs do is merely reinforce his testimony, but that's pretty important.
>
> And there is also no doubt that drug profile stuff, things like having cell phones and beepers and being in a neighborhood in the City, can be more prejudicial than substantive in today's world.
>
> I remember when I first became a District Judge the only people who had beepers were dope dealers and doctors, but that's not the case nowadays. You see people walking down the street with two beepers, and a –well, I know one Judge that walks down the street with two beepers and a cell phone on his belt. Not this one, but I know one in this county that does, and he is not a drug dealer.
>
> The information, when you take in its total, the Court is going to determine, may have been so substantive that the error may have denied Mr. Horton a fair trial. The –both the prosecutor, and defense lawyer, and the Judge had a duty to see to it that the impeachment instruction was given and nobody followed up on that. The profile information is not to be presented to the jury by law, at least not without a cautionary instruction. The failure to get the pay stubs admitted was an act of neglect by Mr. Horton's defense attorney.
>
> Frankly, one of the things that nobody argued, but was pointed out to me by the law clerk, is that Mrs. Horton was in the courtroom, or in the courthouse, at the time of trial, there was a reference made that she was sequestered, she could have testified to vouch for her pay stubs and she wasn't asked to. And, so, this Court agrees that there probably should be a new trial.

[2] MCL 770.1 provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

[3] MCR 6.431(B) provides:

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justice,' grant the defendant's motion for a new trial." *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).

As we stated in *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999), we review the trial court's decision to grant or deny a new trial for an abuse of discretion:

> A trial court's decision to grant a new trial is reviewed for an abuse of discretion. See, e.g., *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). In order to determine whether the trial court abused its discretion, we are required to examine the reasons given by the trial court for granting a new trial. *Id. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief.* See *id.*; *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539-543; 506 NW2d 890 (1993). [Emphasis added.]

In the present case, the evidence in support of the charge against defendant of possession of marijuana with intent to deliver, MCL 333.7402(2)(d)(iii), was substantial and overwhelming. Specifically, defendant was the driver and sole occupant of a vehicle found to contain 142.8 grams of marijuana. The marijuana was packaged in six separate bags: five containing one ounce of marijuana, the sixth, a quarter of an ounce. Defendant appeared nervous where he was arrested for a traffic violation. In a search incident to defendant's arrest, the police found a pager, a cell phone, $946 in cash, and the six bags of marijuana.

In the lower court and on appeal, defendant argued that his counsel was ineffective at trial in failing to introduce additional evidence in support of defendant's innocent explanation for the $946 in cash. In addition, defendant argued that counsel was ineffective and/or plain error occurred by the admission, without objection, of expert testimony by State Police Trooper Dale Girke regarding the significance of circumstantial evidence used to establish defendant's intent to deliver. Assuming that Trooper Girke's testimony was error, defendant also asserted that counsel was ineffective and/or plain error occurred by the failure of the trial court to give a cautionary or limiting jury instruction regarding the testimony of Trooper Girke. Finally, defendant argued that the trial court committed error requiring reversal by failing to give an impeachment jury instruction.

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> Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

I

Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel at trial, defendant must prove that his counsel's performance was deficient under an objective standard of reasonableness and absent the counsel's errors, there is "reasonable probability" that the result would have been different. *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

On appeal, defendant contends that his trial counsel was ineffective for failing to introduce as exhibits at trial his wife's paycheck stub in the amount of $400 and defendant's paycheck stub of $300. However, defendant testified at trial that the source of most of the cash was from his wife's paycheck and his paycheck. If the paycheck stubs had been admitted into evidence, the exhibits would have been cumulative to defendant's testimony. Further, defendant's credibility would have remained at issue on the question whether the money originated from the paychecks or from other sources.

A thorough review of the trial transcript reveals that defense counsel vigorously and competently represented his client. While in retrospect, defendant can argue that the paycheck stubs probably should have been admitted into evidence, trial counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). On this record, defendant has not sustained his burden of proving that his trial counsel's performance was objectively unreasonable. Further, defendant has not sustained his burden of demonstrating prejudice. After considering all the other evidence, we conclude that even if the paycheck stubs had been admitted into evidence, it is not "reasonably probable" that the result would have been different. *Strickland v Washington*, *supra; People v Pickens*, *supra*. The same is true in regard to the omitted impeachment instruction.

In regard to defendant's other claims of ineffective assistance of counsel, we find no error and therefore conclude that objections or proposed limited instructions would have been futile. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

II

Plain Error

Next, defendant argues that the trial court committed plain error requiring reversal by admitting, without objection, the expert testimony of Trooper Dale Girke and in failing to sua sponte give a cautionary or limiting jury instruction regarding Trooper Girke's testimony. We disagree.

The trial court qualified Trooper Girke as an expert witness on the sale and distribution of marijuana. As an expert witness, Trooper Girke testified regarding the significance for sale and

distribution of the individually packaged bags of marijuana as well as the pager and cell phone. Unlike *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), Trooper Girke did not express his opinion regarding defendant's guilt based on a drug profile. Rather, consistent with *Hubbard* and *People v Murray*, 234 Mich App 46; 593 NW2d 690 (1999), Trooper Girke properly limited his testimony to the potential significance, if any, of the evidence on the issue of defendant's intent to deliver. See *People v Ray*, 191 Mich App 706; 479 NW2d 1 (1991).[4] Accordingly, defendant's argument that the trial court improperly admitted drug profile evidence as substantive evidence of guilt and therefore should have given a cautionary limited instruction is without merit.

Finally, defendant asserts that even if Trooper Girke was a qualified expert witness, his expertise did not extend to testimony regarding the use of the marijuana. First, in light of Trooper Girke's extensive "knowledge, skill, experience, training, or education" in the field of narcotics, we conclude the trial court abused its discretion in refusing to qualify Trooper Girke as an expert on the use of marijuana. MRE 702. The trial judge's ruling that "the use of marijuana means that he [the proposed expert] went out and he smokes a joint everyday, and knows how to get high" is clear error. Trooper Girke was qualified as an expert on use, not based on his personal experience with using narcotics, but because of his extensive knowledge, training, and education. Second, in view of the large quantity of marijuana found in defendant's possession (142.8 grams), error, if any, regarding an opinion that such amount was excessive for personal use was harmless. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Defendant has not established that it is "more probable than not" that absent this testimony, the jury's verdict would have been different. *Id.*

Because the reasons given by the trial court for granting defendant's motion for a new trial do not provide a legally recognizable basis for relief, we hold that the trial court abused its discretion in granting defendant's motion for a new trial. *People v Jones*, *supra*. Defendant was entitled to a fair trial, not necessarily a perfect one. *Delaware v Van Arsdall*, 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986); *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988).

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[4] In *Ray*, *id* at 707-708, we held:

> Officer Rosenstangel was properly qualified as an expert on the basis of his training and experience with observing drug use and drug trafficking. The trial court did not abuse its discretion in permitting his expert testimony. Rosenstangel testified that the quantity of crack cocaine found in defendant's possession, the fact that the rocks of crack cocaine were evenly cut, and the selling price of crack cocaine on the street clearly indicated that defendant intended to sell the drugs and not simply use the crack cocaine for personal consumption. Such information was not within the knowledge of a layman, and Rosenstangel's testimony would have aided the jury in determining defendant's intent and, thus, his guilt of the charged offense. The fact that the testimony did embrace the ultimate issue of intent to deliver did not render the evidence inadmissible. [*People* v] *Smith* [425 Mich 98, 105; 387 NW2d 814 (1986)], *supra*.

Reversed and remanded with instructions to reinstate defendant's conviction and sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter